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## TRANSNATIONAL LEGAL COMMUNICATION: A PARTIAL LEGACY OF SUPREME COURT PRESIDENT AHARON BARAK

Markus Wagner\*

### I. INTRODUCTION

In 2006, Aharon Barak, then President of the Supreme Court of Israel, assigned a group of clerks the task of comparing the response of legal systems to the question of prison privatization. The exercise, performed by half a dozen law students and lawyers from almost as many countries, produced an overview of not only the legal rules pertaining to the question of prison privatization, but also gave insight into the rationale for why different countries craft legal rules that sometimes differ to a considerable extent. While some courts have the occasional foreign law clerk, it is rare for a court to have a significant number of them. More importantly, this exercise was a reflection of a characteristic that makes the Supreme Court of Israel stand out among other similarly placed institutions. Generally and for historical reasons, but increasingly under the tenure of President Barak, the Supreme Court of Israel has made considerable use of foreign law in its decision-making process. This came about by and large due to the constitutional fabric of the country at its origin, in addition to the formation of the country's legal community.<sup>1</sup> But the frequency with which the Supreme Court used comparative law methods in its decision-making took an unprecedented turn during his tenure.

In order to investigate the legacy of former President Barak, this paper explores the framework designed by Anne-Marie Slaughter on what she called "transjudicial communication," a concept she later coined as "transnational judicial dialogue."<sup>2</sup> It then

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1. Foundations of Law, 5740-1980, 34 LSI 181 (1948-1989) (Isr.). There is considerable latitude to use comparative law as evidenced by Article 1 of the Foundations of Law which lists the sources the Supreme Court may turn to in its decision-making: "Where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case-law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel's heritage." *Id.* Traditionally, this language has been interpreted broadly, although there is disagreement about the meaning of the provision. *See generally* Pablo Lerner & Alfredo Mordechai Rabello, *The (Re)Codification of Israeli Private Law: Support for, and Criticism of, the Israeli Draft Civil Law Code*, 59 AM. J. COMP. L. 763 (2011); A. David Pardo, *Judicial Discretion in Talmudic Times and the Modern Era*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 429, 449 (2009).

2. *See* Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State*

expands this framework to demonstrate the true impact of President Barak's work. While the original conception of transnational judicial dialogue was developed for different purposes, it is a useful tool in exploring the impact of the justice and the scholar Aharon Barak. This framework cannot adequately account for President Barak's work outside of the courtroom however, which was a realm of influence just as important as the traditional categories of transnational judicial dialogue in understanding his jurisprudence. His contributions outside of the courtroom include his scholarly writing, his teaching at many prestigious institutions around the world, and his virtual omnipresence at conferences.

This paper will leave aside the question of the propriety of the use of foreign or international law in the domestic decision-making processes.<sup>3</sup> It is not concerned with whether a particular court is the leader for other courts adopting its jurisprudence<sup>4</sup> and does not address the propriety of using comparative law in general or in a particular setting. There are legitimate arguments on either side of those debates, and some are more convincing than others.<sup>5</sup> It suffices to say, however, that contextualizing one's own legal system by reference to others and potentially uncovering unstated assumptions, appears to be a valid form of challenging these assumptions. The purpose of this article is an analysis of the jurisprudential legacy of President Barak, but it also attempts to create a framework for analyzing his life's work.

The paper first provides a concise overview of transnational judicial dialogue as it initially developed (II.). It then develops that framework further by more closely analyzing the different forms that such transnational judicial dialogue can take. This may take the form of the well-analyzed open dialogue among members of judicial institutions to non-open forms of communication in which the participants do not reveal the source of their reasoning. Moreover and crucially, the impact of personalities such as President Barak could not be captured by only taking account of the open forms or quasi-open forms of judicial dialogue. In order to assess the direct and indirect impact on non-judicial institutions, the paper introduces the concept of "transnational legal communication" (III.), before offering some concluding remarks (IV.).

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*Doctrine*, 92 COLUM. L. REV. 1907, 1923 (1992); Melissa Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 490 (2005). Waters defines the term as "the engine by which domestic courts collectively engage in the co-constitutive process of creating and shaping international legal norms and, in turn, ensuring that those norms shape and inform domestic norms." *Id.* Note, however, that Waters' definition does not encompass communication between international institutions and domestic institutions.

3. See generally ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* (2003); Carl Baudenbacher, *Foreword: Globalization of the Judiciary*, 38 TEX. INT'L L.J. 397 (2003); Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT'L L. 59 (2009); Michael Kirby, *Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges*, 9 MELB. J. INT'L L. 171 (2008); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003).

4. See Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537 (1988); Adam Liptak, *American Exception: U.S. Court Is Now Guiding Fewer Nations*, N.Y. TIMES, September 18 2008, at A1, available at <http://www.nytimes.com/2008/09/18/us/18legal.html?pagewanted=all>. This appears to be an almost uniquely American preoccupation.

5. *Lawrence v. Texas*, 539 U.S. 538 (2003) (Scalia, J., dissenting). The opposition to foreign law, even with a limited role, has been famously stated by Justice Antonin Scalia, who noted that "this Court . . . should not impose foreign moods, fads, or fashions on Americans." *Id.* (internal citations omitted).

## II. THE ORIGINAL CONCEPT OF TRANSNATIONAL JUDICIAL DIALOGUE

Far from being a new concept, dialogue between domestic courts has been in practice for a considerable period of time. The shared heritage of common law countries has facilitated and necessitated communication between courts of this tradition since their inception.<sup>6</sup> In the civil law world, domestic courts engaged in dialogue even before the period of codification, which started with the creation of the French Civil Code in the late 18<sup>th</sup> century and its promulgation in 1804.<sup>7</sup> More importantly for present purposes, many of Europe's highest courts have been communicating with one another since the end of World War II. This communication sometimes takes place through hierarchical and somewhat predetermined mechanisms, such as the European Union's Court of Justice and its predecessors or the Council of Europe's European Court of Human Rights. On the other hand, courts also communicate directly with one another.<sup>8</sup> This phenomenon is not confined to these spheres; rather, it has taken on global dimensions.<sup>9</sup>

Anne-Marie Slaughter's original concept described a typology of transjudicial communication modes. With regard to the participants, Slaughter distinguishes between three different types of communication:<sup>10</sup> (1) horizontal communications between the highest courts in each constitutional system, such as the use of proportionality testing in Canada, the so-called *Oakes* test,<sup>11</sup> which is generally acknowledged to be adopted from the German Constitutional Court's ("GCC") test of *Verhältnismäßigkeit*,<sup>12</sup> (2) vertical communication between international/transnational judicial bodies with the traditional example being communication between the Court of Justice and the courts of the EU member states regarding the reach of EU law and the competencies of the respective courts;<sup>13</sup> and (3) mixed vertical-horizontal communication modes in which international or supranational institutions are the lynchpin for the communication among different

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6. Reinhard Zimmermann, *Roman Law and the Harmonisation of Private Law in Europe*, in TOWARDS A EUROPEAN CIVIL CODE, 21, 25 (Arthur Hartkamp et al. eds., 3d ed. 2004).

7. Helmut Koziol, *Tort Liability in the French 'Code Civil' and the Austrian 'Allgemeines Bürgerliches Gesetzbuch'*, in THE INFLUENCE OF THE FRENCH CIVIL CODE ON THE COMMON LAW AND BEYOND 261, 261 (Duncan Fairgrieve ed., 2007).

8. See generally ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 79 (2004); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

9. Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 793 (1997); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 821 (1999).

10. Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 103-12 (1994).

11. *R. v. Oakes*, [1986] 1 S.C.R. 103 (Can.).

12. See generally Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383 (2007) (analyzing and comparing the development of the Canadian and German standards).

13. See generally, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1974, 2 C.M.L.R. 540, 1974 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 22, 1986, 3 C.M.L.R. 225, 1987 (Ger.). These two decisions by the German Constitutional Court, the so-called *Solange I* and *Solange II* decisions, dealt with the issue of supremacy of European law. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 1993, 1 C.M.L.R. 57, 1994 (Ger.). This was the so-called *Maastricht* decision. On the *Maastricht* decision, see generally Joachim Wieland, *Germany in the European Union--The Maastricht Decision of the Bundesverfassungsgericht*, 5 EURO. J. INT'L. L. 259 (1994). See generally J.H.H. Weiler, *The State "über alles"--Demos, Telos and the German Maastricht Decision* (Jean Monnet Ctr. for Int'l & Reg'l Econ. Law & Justice N.Y Univ. School of Law, Working Paper No. 6/95, 1995).

jurisdictions. It should be noted, however, that the classification of these relationships as horizontal, vertical, or mixed may be debatable, depending on whether one regards the relationship between the highest courts in the countries belonging to the Council of Europe and the European Court of Human Rights (“ECtHR”) as belonging to one constitutional framework. Furthermore, EU law, especially under Article 267 of the Treaty on the Functioning of the European Union (“TFEU”) (ex-Article 234; previously Article 177), mandates that domestic courts submit a case to the Court of Justice for a preliminary ruling, thereby requiring the courts to engage with one another.<sup>14</sup>

Slaughter refines her model by outlining the different degrees to which courts can engage with one another: (1) through direct dialogue between the different courts, where the communication is overt; (2) through a monologue, where the communication is one-sided and the originator may not be aware that its decision has been used; and (3) through what Slaughter refers to as “intermediated dialogue,” where international or supranational courts or entities facilitate dialogue between domestic institutions.<sup>15</sup>

Moving away from the structural and mechanical elements of communication, Slaughter describes the functions of transjudicial dialogue.<sup>16</sup> On the international/supranational level, she proposes that dialogue engages domestic courts in a quest for increased legitimacy, which enhances their work through increased effectiveness and adherence to international obligations. But more importantly, this process serves to disseminate ideas between both international and domestic jurisdictions.<sup>17</sup> This type of communication, labeled “cross-fertilization,” is the least formal because it “requires little direction or targeting.”<sup>18</sup> The recipient is able to disregard the information entirely or absorb it with or without acknowledgement of the source. The critics of the use of comparative law in judicial decision-making find cross-fertilization to be the most problematic type of communication. It is viewed as an illegitimate use of non-domestic sources in decision-making that is supposed to be responsive to the domestic polity.

A final function of transjudicial communication is what Slaughter labels “collective deliberation,” a process in which various actors engage in a discourse over common problems.<sup>19</sup> By its nature, this type of communication takes place in formalized systems (or relationships), but it is harder to find evidence of it in purely horizontal relationships. This is evident from the examples that Slaughter provides, largely focusing on the Court of Justice and the ECtHR.<sup>20</sup>

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14. Treaty on the Functioning of the European Union art. 267, May 9, 2008, 2008 O.J. (C 115) 164.

15. Slaughter, *supra* note 10, at 113-14.

16. *Id.* at 114-22. For a different typology, differentiating between three models of resistance, convergence and engagement, see Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 112-14 (2005).

17. Slaughter, *supra* note 10, at 116-18.

18. *Id.* at 117-18.

19. *Id.* at 119.

20. *Id.* at 120-22.

### III. TRANSNATIONAL JUDICIAL DIALOGUE 2.0 OR TRANSNATIONAL LEGAL COMMUNICATION

The original conception of transjudicial communication was largely confined to the modes of communication between judges that can be traced through the official pronouncements in the publications of the courts. Just as important, however, are the modes of communication that are harder to trace, which Ronald Krotoszynski calls the “weak forms” of international judicial dialogue.<sup>21</sup> These open and “weak forms”, as well as other modes of communication are what this paper introduces as “transnational legal communication.”<sup>22</sup> As numerous authors have pointed out, it is oftentimes difficult, if not impossible, to trace the processes by which argumentative processes have evolved. Nevertheless, this article attempts to paint a picture of the work President Barak has done over the last decades by way of examples and by expanding the original conception of transnational judicial communication where necessary. It should not come as a surprise that President Barak has been a prolific member of most of these transnational legal communication mechanisms.

#### A. Open Dialogue Between Domestic Courts

The category of open dialogue between domestic judicial institutions is the most prevalent form of transnational legal communication. Within the European Union, it is partially constitutionally mandated between domestic courts and the Court of Justice.<sup>23</sup> Among European countries, this topic has been studied in greater detail, as evidenced by a study on cross-citations among ten European supreme courts.<sup>24</sup> Based on over half a million decisions, the authors arrived at a number of conclusions. There are certain jurisdictions from which particular courts appear to prefer to borrow dialogue (seven out of ten). This may be traced back to familiarity with language and through sharing a

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21. Ronald J. Krotoszynski Jr., “*I’d Like to Teach the World to Sing (in Perfect Harmony)*”: *International Judicial Dialogue and the Muses—Reflections on the Perils and the Promise of International Judicial Dialogue*, 104 MICH. L. REV. 1321, 1325 (2006) (reviewing JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION (Robert Badinter & Stephen Breyer eds., 2004)).

22. The true impact of a court’s or an individual justice’s influence outside the judicial realm has not been taken up by the original design. This was not a necessary task, given the aspiration of the proponents of that model, such as “building regional and, perhaps, ultimately global communities of law.” Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 391 (1997).

23. See Treaty on the Functioning of the European Union art. 267, May 9, 2008, 2008 O.J. (C 115) 164.

24. See generally Martin Gelter & Mathias M. Siems, *Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations between Ten European Supreme Courts* (Maastricht Eur. Private Law Inst., Working Paper No. 2011/03 & Fordham Law Legal Studies Research Paper No.1722721, 2011), available at <http://ssrn.com/abstract=1722721>; Martin Gelter & Mathias M. Siems, *Language, Legal Origins, and Culture before the Courts: Cross-Citations between Supreme Courts in Europe* (Fordham Law Legal Studies Research Paper No. 1719183, 2010), available at <http://ssrn.com/abstract=1719183>. See also Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT’L L. 241, 253 (2008) (noting that the jurisdictions of the majority of the cases these courts adjudicate, only in rare cases, touch on politically sensitive areas where governments’ interests are directly implicated).

common legal heritage, such as Germany, Austria, and Switzerland.<sup>25</sup> However, that type of communication is not necessarily a two-lane street, as in the case of Austria and Switzerland, where the communication appears to be inbound rather than outbound.<sup>26</sup> This example forms the basis of another conclusion; namely, that certain countries appear to be part of the center, such as France, Germany, and England, while some are considerably less connected with others occupying the middle ground, though none of the countries under review are unconnected.<sup>27</sup> As with other studies, there are certain factors that lead to uncertainties when interpreting the results. E.g., some judges are more explicit than others about the origin of their influence.<sup>28</sup> In addition, cross-citations cannot lead to a conclusion these citations even actually had an influence.

Considerable use of cross-referencing has been made in decisions concerning anti-terrorist measures in the wake of September 11, 2001.<sup>29</sup> This development can be observed in countries such as Canada, the United Kingdom, Israel, Germany, France, and New Zealand. Most famously, this development in the European Court of Justice's decision in *Kadi*<sup>30</sup> was rather unsurprising. Owing to the common origin and similar way of implementing these anti-terrorist measures — a considerable number of which are based on S/RES/1373<sup>31</sup> — and given the curtailing of civil liberties these measures created, it was almost natural that a review of these anti-terrorist measures and, at least implicitly, the power of the Security Council to mandate them would occur. Courts, which are connected through either formal or informal networks and interpret similar language while weighing these measures against fundamental principles of democracy and liberty, will inevitably look at the jurisprudence of courts in other countries.<sup>32</sup>

Another example was a case in which President Barak was originally involved, in which comparative law ultimately played an overt role.<sup>33</sup> Sitting as the High Court of Justice in late 2009, the Court, after considerable public debate, found the privatization of prisons, as envisioned by the Knesset, was unconstitutional. The case was originally slated to be decided in 2006 while President Barak was still in office. However, the Knesset decided to reconsider the question late in the summer of 2006. Because President Barak was about to retire, he could not participate in the decision.<sup>34</sup> In an 8-1

25. For an example where both “rational” explanations, such as language barriers, lack of time, “cultural” explanations, and decisional tradition, appear to prevent courts from cross-referencing each other, see Dr. Hélène Lambert, *Transnational Judicial Dialogue, Harmonization and the Common European Asylum System*, 58 INT'L & COMP. L.Q. 519, 533-35 (2009). But see the burgeoning use of cross-reference in Irish refugee law in Siobhan Mullally, *Speaking Across Borders: The Limits and Potential of Transnational Dialogue on Refugee Law in Ireland*, in THE LIMITS OF TRANSNATIONAL LAW: REFUGEE LAW, POLICY HARMONIZATION AND JUDICIAL DIALOGUE IN THE EUROPEAN UNION, 150, 166-67 (Guy S. Goodwin-Gill & Hélène Lambert eds., 2010).

26. Gelter & Siems, *Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations between Ten European Supreme Courts*, *supra* note 24, at 8.

27. *See id.* at 14 fig. 5.

28. *Id.* at 17-18.

29. Benvenisti, *supra* note 24, at 255-56.

30. Case T-315/01, *Kadi v. Council & Comm'n*, 2005 E.C.R. II-3649.

31. *See generally* S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

32. For further examples, see Benvenisti, *supra* note 24, at 255-56.

33. HCJ 2605/05 Academic Ctr. of Law & Bus. v. Minister of Fin. [2009] (Isr.), *available at* [http://www.privateci.org/private\\_pics/Israel\\_Ruling.pdf](http://www.privateci.org/private_pics/Israel_Ruling.pdf).

34. *See* Yuval Yoaz, *Knesset Given Six Months to Decide on Prison Privatization*, HAARETZ, Jan. 9, 2006, [www.haaretz.com/print-edition/news/knesset-given-six-months-to-decide-on-prison-privatization-1.196305](http://www.haaretz.com/print-edition/news/knesset-given-six-months-to-decide-on-prison-privatization-1.196305).

decision, the Supreme Court decided that because of the profit motive of private contractors, the transfer of authority for prison management to a private contractor violated the constitutional principles of human rights and dignity.<sup>35</sup>

There are a host of interesting issues surrounding this case: the exercise of inherent governmental functions by entrusting them to private parties; whether liberty and dignity are the right “hooks” for making these arguments; whether there was another way to reach the same goal rather than inventing a “right against privatization”; whether it is cheaper to house prisoners through private contractors and if so, what non-economic costs are incurred; whether courts should decide the latter question; and to what extent the political process prevented judgment from being rendered earlier.<sup>36</sup> All of these questions are contentious, and oftentimes, countries that have considered them have found very different answers. The court’s use of the comparative research in the final decision is relatively modest and does not go into great detail. The research focuses on the experiences of the United States and the United Kingdom in privatizing prisons but distinguishes them from the situation in Israel. Furthermore, the court encountered difficulty in finding partners with which to communicate in other countries. The situation in Germany and France was such that the governments had rejected, partially on constitutional grounds, the privatization of prisons or only allowed privatization to an extent that made it unfeasible for private partners. Additionally, the idea of handing over imprisonment, considered to be a core function of government with attendant political responsibility and democratic accountability challenges,<sup>37</sup> was considered to be contrary to the constitutional and political culture. This notion explains the difficulty in finding cases outside of countries that historically have had a longer track record of privatizing incarceration.<sup>38</sup> The decision may, however, serve a different function in the context of transnational legal communication. As the first decision of its kind to outright reject prison privatization, it may well set the tone for adjudication of this question in other countries in the future.

Sensible comparison is only possible between countries with a common ideological basis.<sup>39</sup> Even in those instances, however, it is sometimes difficult to ascertain the true workings of the court, as courts from neighboring countries sometimes do not possess enough contexts to reliably evaluate judgments.<sup>40</sup> This view is reflected domestically in Justice Breyer’s dissent in *Knight v. Florida*.<sup>41</sup> In that decision, he pointed out that “this Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances.”<sup>42</sup> While acknowledging

35. See HCJ 2605/05 Academic Ctr. of Law & Bus. v. Minister of Fin., slip op. 27, 28-29 [2009] (Isr.).

36. *Id.* at 56, 73, 78, 81, 95, 105; Barak Medina, *Constitutional Limits to Privatization: The Israeli Supreme Court Decision to Invalidate Prison Privatization*, 8 INT’L J. CONST. L. 690, 691 (2010).

37. HCJ 2605/05 Academic Ctr. of Law & Bus. v. Minister of Fin., slip op. 63-64 [2009] (Isr.).

38. *Id.* at 98.

39. AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 198 (2006). For a review of the challenges in norm-creation and norm-consumption and their distribution, see Mark Toufayan, *Identity, Effectiveness, and Newness in Transjudicialism’s Coming of Age*, 31 MICH. J. INT’L L. 307, 329 (2010).

40. Krotoszynski Jr., *supra* note 21, at 1325.

41. *Knight v. Florida*, 528 U.S. 990 (1999).

42. *Id.* at 997.



the decisions of the ECtHR, the Indian Supreme Court, and the Privy Council as non-binding, he nevertheless considered “their views . . . useful.”<sup>43</sup> This type of “acknowledgement of society’s concept of decency and human dignity” can also be found in the jurisprudence of the Supreme Court of South Africa in its decision on whether physical punishment, specifically whipping, was a permissible form of criminal sentencing or whether it violated the standards of humanity.<sup>44</sup>

While communicating at least in one direction, courts do not always cite another court’s jurisprudence in an approving manner. One example is the treatment of how to implement decisions of the International Court of Justice (“ICJ”). In *Medellin*, the majority of the Supreme Court held the decisions of the ICJ as non-binding and found that international law does not require that states give direct effect to a decision of the ICJ.<sup>45</sup> A few years prior, the German Constitutional Court held otherwise<sup>46</sup> than its US counterpart in a previous decision.<sup>47</sup> The GCC distinguished the latter decision from its own by acknowledging that while it too believed that the ICJ decision did not have direct effect, the ICJ decision did require respectful consideration and provided a normative guideline for the application and interpretation of international law.<sup>48</sup> The approach of the GCC could not have been more different from that of its U.S. counterpart, which found that ICJ decisions were authoritative unless the German Constitution demanded that a contrary solution be found.<sup>49</sup> Therefore, it opted for a relationship that calls for an intervention only in situations in which a decision of an international adjudicatory body encroaches upon constitutional values.<sup>50</sup> Similar debates can be found in a dispute concerning damages for crimes committed during World War II. In that decision, the Italian *Corte di Cassazione* criticized the decision of its Greek sister court for relying on the claim “that the violation of peremptory norms of international law,” which concerned “fundamental human rights,” resulted in a denial of benefits regularly enjoyed by states through sovereign immunity and “an implied waiver of sovereign immunity.”<sup>51</sup> The conversation however, did not end there, for the Italian court’s decision itself was the subject of severe criticism by the House of Lords dealing with state immunity for

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43. *Id.* at 998.

44. *State v. Williams* 1995 (3) SA 632 (CC) at 13 para. 35 (S. Afr.). For a more thorough exploration of the concept of human dignity in the South African context, see Arthur Chaskalson, *Human Dignity as a Constitutional Value*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 133, 139 (David Kretzmer & Eckart Klein eds., 2002).

45. *Medellin v. Texas*, 552 U.S. 491, 498 (2008).

46. *See generally* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 19, 2006, 2 BvR 2115/01 (Ger.). *See also* Jana Gogolin, *Avena and Sanchez-Llamas come to Germany—The German Constitutional Court Upholds Rights under the Vienna Convention on Consular Relations*, 8 GER. L.J. 261, 265 (2007).

47. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006).

48. *Id.* at para. 62.

49. *See generally* Carsten Hoppe, *Implementation of LaGrand and Avena in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights*, 18 EUR. J. INT’L L. 317 (2007).

50. Andreas Paulus, *A Comparative Look at Domestic Enforcement of International Tribunal Judgments*, 103 AM. SOC’Y INT’L L. 42, 45-46 (2009).

51. Andrea Bianchi, *Ferrini v. Federal Republic of Germany*, 99 AM. J. INT’L L. 242, 243 (2005).

torture.<sup>52</sup> The matter has resulted in a case before the ICJ, in which the ICJ rejected the claim by Italy, upholding the principle of sovereign immunity.

### B. Open Communication Between Domestic Courts and International Courts

Dialogue between international and domestic courts is yet another form of judicial communication. Europe provides a rich field for exploration, regardless of whether one considers the Court of Justice or the ECtHR to be supranational/international institutions or part of the constitutional framework. Moving slightly away from the example of *Medellín*, the Supreme Court's decision in *Sanchez-Llamas v. Oregon* provides an example of communication between a domestic and international court.<sup>53</sup> This dialogue started years before (consider the long history of the cases concerning *LaGrand*,<sup>54</sup> *Avena*<sup>55</sup> and *Medellín*<sup>56</sup>) and culminated to this day with the Supreme Court's decision in *Sanchez-Llamas*.<sup>57</sup> As one observer comments, "In perhaps no other legal debate of recent years have the battle lines been drawn more starkly than in the controversy over U.S. courts' engagement in transnational judicial dialogue with foreign courts."<sup>58</sup> Having rejected the direct application of the ICJ judgments in *Medellín* or even allowing for at least more than "respectful consideration,"<sup>59</sup> Chief Justice Roberts made clear that the relationship between the ICJ and the Supreme Court is not one of subordination by the latter, but rather one in which the latter holds the upper hand in determining what effect a ruling of the ICJ may have as a matter of federal law.<sup>60</sup> It is only logical then that the Supreme Court found the procedural default rule did give "full effect" to Article 36 of the Vienna Convention on Consular Relations.<sup>61</sup> In the following passages,

52. See generally *Jones v. Saudi Arabia*, [2006] UKHL 26 (appeal taken from Eng.).

53. See generally *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006).

54. See generally *LaGrand* (Ger. v. U.S.), Provisional Measures, 1999 I.C.J. 9 (Mar. 3). For the U.S. Supreme Court's response to the indication of provisional measures, see generally *Germany v. United States*, 526 U.S. 111 (1999). For the ICJ's judgment, see generally *LaGrand* (Ger. v. U.S.), Judgment, 2001 I.C.J. 466 (June 27); Bruno Simma & Carsten Hoppe, *From LaGrand and Avena to Medellín-A Rocky Road Toward Implementation*, 14 TULSA. J. INT'L & COMP. L. 7 (2005).

55. *Avena and Other Mexican Nationals* (Mex. v. U.S.), Request for Interpretation of the Judgment, 2009 I.C.J. 3 (Jan. 19).

56. For the order indicating provisional measure, see generally *Avena and Other Mexican Nationals* (Mex. v. U.S.), Provisional Measures, 2003 I.C.J. 77 (Feb. 5). For the judgment, see generally *Avena and Other Mexican Nationals* (Mex. v. U.S.), Judgment, 2004 I.C.J. 12 (Mar. 31), and *Avena and Other Mexican Nationals* (Mex. v. U.S.), Request for Interpretation of the Judgment, 2009 I.C.J. 3 (Jan. 19). Mexico sought clarification of the judgment subsequent to the execution of a number of Mexican nationals. See generally Laurence Dubin, *Les Garanties de Non-Répétition à l'aune des Affaires LaGrand et Avena*, 109 REVUE GÉNÉRALE DE DROIT INT'L PUB. 859 (2005); Malvina Halberstam, *LaGrand and Avena Establish a Right, But is there a Remedy? Brief Comments on the Legal Effect of LaGrand and Avena in the U.S.*, 11 ILSA J. INT'L & COMP. L. 415 (2005); Hoppe, *supra* note 51. For the US Supreme Court's response, see *Medellín v. Texas*, 552 U.S. 491, 499 (2008). For a more positive view for future cases due to the litigation in *Medellín*, see Janet Koven Levit, *Does Medellín Matter?*, 77 FORDHAM LAW L. REV. 617, 618 (2008).

57. *Sanchez-Llamas*, 548 U.S. 331.

58. Melissa Waters, *Treaty Dialogue in Sanchez-Llamas: Is Chief Justice Roberts a Transnationalist, After All?*, 11 LEWIS & CLARK L. REV. 89, 89 (2007).

59. *Sanchez-Llamas*, 548 U.S. at 355.

60. *Id.* at 355-56.

61. *Id.* at 334.

Roberts provides an explanation for his finding in that “procedural default rules generally take on greater importance in an adversary system such as ours” and contrasts the U.S. system from that of civil law countries where failure to raise a claim can potentially be remedied.<sup>62</sup>

Some have considered this opinion as a form of dialogue in which both sides tried to educate the other.<sup>63</sup> It is true that dialogue in its ideal form is not uni-directional, but instead should be a two-way communication. In a perfect situation, there would be true dialogue where courts would respond to one another’s decisions in what one commentator calls a “co-constitutive process of norm development.”<sup>64</sup> However, this is difficult, if not impossible, to achieve.<sup>65</sup> When human lives are at stake, as was the case in *Sanchez-Llamas*, one envisions a different approach to giving “full effect” to the obligations into which the United States has entered.<sup>66</sup> Furthermore, the underlying tone in the majority opinion in *Sanchez-Llamas* is indicative much less of a genuine willingness to engage in productive dialogue, but rather a perception that the ICJ is not fully aware of the applicable rules in the United States.

The exchange between the ICJ and the Supreme Court of Israel following the building of the Israeli separation barrier is another example of communication between an international court and a domestic court.<sup>67</sup> The decisions centered on the creation of a separation barrier, which was constructed to decrease the rising number of terrorist attacks on Israeli citizens.<sup>68</sup> Its route partially tracks the 1949 Armistice Line, but also, in certain sections, extends into Palestinian territory.<sup>69</sup>

The Supreme Court’s first decision on the separation barrier, *Beit Sourik*,<sup>70</sup> came

62. *Id.* at 357.

63. Waters, *supra* note 58, at 96.

64. Waters, *supra* note 2, at 497.

65. See Gelter & Siems, *Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations between Ten European Supreme Courts*, *supra* note 24, at 17; Lambert, *supra* note 25, at 519-20. One situation in which this may have worked is the ongoing communication between the European Court of Justice (at the time) and the German Constitutional Court over the protection of individual liberties within the European framework. Note, however, that this type of dialogue is mandated by the close integration of national legal systems into the European Union. See also Benvenisti, *supra* note 24, at 251.

66. See *Sanchez-Llamas*, 548 U.S. at 382 (Breyer, J. dissenting). Note that Breyer’s dissent provided an interpretation in which “full effect” would have been given to the requirements of Article 36 the Vienna Convention on Consular Relations (VCCR).

67. Because there is no shortage of commentary on this issue, see Lori Fisler Damrosch & Bernard H. Oxman, *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Editor’s Introduction*, 99 AM. J. INT’L L. 1, 1 (2005); David Kretzmer, *Introduction: Domestic and International Judicial Review of the Construction of the Separation Barrier*, 38 ISR. L. REV. 6, 8 (2005); see also Aeyal M. Gross, *The Construction of a Wall between The Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation*, 19 LEIDEN J. INT’L L. 393, 394 (2006); Yuval Shany, *Head Against the Wall? Israel’s Rejection of the Advisory Opinion on the Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territories*, 7 Y.B. INT’L HUMANITARIAN L. 352, 352 (2004).

68. Daphne Barak-Erez, *Israel: The Security Barrier - Between International Law, Constitutional Law, and Domestic Judicial Review*, 4 INT’L J. CONST. L. 540, 544, 547 (2006); *Israel’s Security Fence: Execution Aspects*, ISRAEL MINISTRY OF DEFENCE, <http://www.seamzone.mod.gov.il/pages/eng/execution.htm>.

69. U.N. Office for the Coordination of Humanitarian Affairs occupied Palestinian territory, Special Focus Report, Seven years after the Advisory Opinion of the International Court of Justice on the Barrier: The Impact of the Barrier in the Jerusalem Area (July 2011), [http://www.ochaopt.org/documents/ocha\\_opt\\_barrier\\_update\\_july\\_2011\\_english.pdf](http://www.ochaopt.org/documents/ocha_opt_barrier_update_july_2011_english.pdf).

70. HCJ 2056/04 Beit Sourik Vill. Council v. Gov’t of Isr. 58(5) PD 807 [2004] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/04/560/020/A28/04020560.a28.pdf](http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.pdf).

down on June 30, 2004. Using a proportionality test, which itself was the result of comparative inquiry, the Court invalidated part of the barrier around the village of Beit Sourik based on the disproportionate impact the particular routing of the wall had on the livelihood of the Palestinian population. The Court did not directly address the question of the legality of the barrier, as it was considered to be a temporary security measure.<sup>71</sup> Less than two weeks later, the ICJ rendered its advisory opinion, declaring that the parts of the wall that were on Palestinian territory were incompatible with international law. While not directly addressing the question of whether the barrier constituted annexation, the ICJ did point out that the route of the wall created a *fait accompli*, which could become permanent.<sup>72</sup> The ICJ addressed the question of self-defense without discussing the fact that self-defense under the UNC is a measure addressed against states and, despite the Security Council resolutions to the contrary, Israel could not invoke this type of self-defense because it was the occupying power.<sup>73</sup> Thus the ICJ arrived at the following conclusions: comply with humanitarian law and the principle of self-determination; stop construction and dismantle existing elements on Palestinian territory; and return property or provide compensation for damages suffered.<sup>74</sup>

The Supreme Court had a chance to respond to the ICJ advisory opinion a little over a year later in *Mara'abe v. The Prime Minister of Israel*.<sup>75</sup> It stated that the advisory opinion was to be given "full appropriate weight."<sup>76</sup> This is in marked contrast to the wording of the Chief Justice of the U.S. Supreme Court in *Sanchez-Llamas*.<sup>77</sup> Nevertheless, the Supreme Court of Israel ultimately found that the ICJ's decision was based on different facts than those in the case before it.<sup>78</sup> The Supreme Court of Israel's treatment of the ICJ advisory opinion in *Mara'abe* is extensive, covering almost 1/3 of the 66 pages of the decision. Most importantly, the differences regarding the factual basis concerned the security rationales for erecting the barrier, which the ICJ barely touched upon.<sup>79</sup> Similar to *Beit Sourik*, the Court found parts of the barrier had to be re-routed based on a proportionality test.<sup>80</sup> The tone of the decision is one of bewilderment. Given that both courts apply the same legal rules to the same situation, how was it that the two courts came to such diametrically opposed conclusions?

Both the ICJ and the Israeli Supreme Court have had the chance to interact with one another. However, this interaction also serves as an example of the potential

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71. *Id.* at paras. 28-29, 32.

72. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 184 (July 9).

73. *Id.* at 194.

74. *Id.* at 197-98.

75. HCJ 7957/04 *Mara'abe v. Prime Minister of Israel* 60(2) PD 477 [2005] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/04/570/079/a14/04079570.a14.htm](http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.htm).

76. *Id.* at para. 56.

77. *Sanchez-Llamas v. Oregon*, 548 U. S. 331, 352-57 (2006). In this decision, the Supreme Court did not give weight to the ICJ's decisions in *LaGrand* (*Ger. v. U.S.*), Judgment, 2001 I.C.J. 466 (June 27) and *Avena and Other Mexican Nationals* (*Mex. v. U.S.*), Judgment, 2004 I.C.J. 12 (Mar. 31).

78. HCJ 7957/04 *Mara'abe v. Prime Minister of Israel* 60(2) PD 477, paras. 59-62 [2005] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/04/570/079/a14/04079570.a14.htm](http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.htm).

79. *Id.* at paras. 66-72. Another reason for the factual differences was the ability of the court proceedings to respond to the different allegations made by either side, something the ICJ had not been able to do.

80. *Id.* at paras. 72-73.

shortcomings of transnational legal communication. The ICJ's perspective, partially brought about by it rendering an advisory opinion without full participation on the part of Israel, led it to avoid addressing an essential part of the equation. The ICJ only dealt in a cursory fashion with the security dimension of the wall and failed to at least take Israel's arguments seriously in that respect.<sup>81</sup> A criticism that may be directed at the Supreme Court of Israel is that throughout both decisions it maintained the barrier should be considered a temporary measure and did not link it to the larger question of the legality of the settlements in the West Bank.<sup>82</sup> Another criticism has been raised over what one author conceives of as the "artificial separations between security and politics, between authority and proportionality."<sup>83</sup> Constrained by these processes as well as their internal procedure,<sup>84</sup> the two courts were precluded from having a true exchange of ideas. Moreover, being presented with the question of the legality of the construction as a whole, the ICJ was in the unenviable position to make pronouncements without being afforded the ability to inspect particular sections of the barrier — which consists of fences in the large majority of its extent and concrete barriers in small but important and easily visible sections — in detail (or having the capacity to compel countries to submit information).<sup>85</sup> *Beit Sourik*, on the other hand, concerned only a small section of the barrier in a particular location. Talking at one another rather than engaging in a true dialogue, the decisions ultimately serve as an example of communication between judicial institutions, though one with serious deficiencies. Such deficiencies are prevalent, though not insurmountable obstacles, in communications between international and domestic institutions (outside of settings in which such communication is mandated by design, such as in the case of the ECtHR<sup>86</sup> or the Inter-American Court of Human Rights) where most decisions are singular in nature, setting aside disputes concerning recurring themes such as the Article 36 VCCR challenges before the ICJ against the United States and the zeroing disputes before the WTO dispute settlement mechanism.

### C. *Dialogue Between Courts and other Institutions*

Another type of transnational judicial dialogue may take place when one participant of the discourse is situated outside of the realm of the judiciary. While this

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81. At least one of the justices indicates it was the ICJ's choice to not engage in such a discussion. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 211-212 (July 9) (separate opinion of Judge Higgins).

82. Yuval Shany, *Capacities and Inadequacies: A Look at the Two Separation Barrier Cases*, 38 ISR. L. REV. 230, 242-44 (2005). Yuval Shany calls this the "Elephant in the Room." *Id.*

83. Gross, *supra* note 67, at 396.

84. Damrosch & Oxman, *supra* note 67, at 1.

85. This is why, according to Judge Buergenthal, the ICJ should have declined to answer the request for an advisory opinion. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 245 (July 9) (separate opinion of Judge Buergenthal).

86. For a study concerning the reputational costs and benefits of the judgments of the European Court of Human Rights, see Shai Dothan, *Judicial Tactics in the European Court of Human Rights*, 12 CHI. J. INT'L L. 115 (2011).

type of communication was not contained in the original conception of transjudicial communication, important debates are not confined to the judiciary. Oftentimes, a discourse in other spheres of international relations reverts back to judicial decisions, whether reached by international adjudicatory bodies or domestic courts.

President Barak was involved in a dialogue with institutions outside the judiciary during a decision rendered at the very end of his tenure on the Supreme Court in December 2006.<sup>87</sup> The Court dealt with the issue of whether the policy of targeted killings was permissible.<sup>88</sup> At the time, the State employed a policy of preemptive strikes against individuals in the West Bank and the Gaza Strip as a means of preventing terrorist attacks that would kill and injure Israeli civilians. However, because of the nature of the strikes and the location of the targeted individuals, the IDF's strikes — in certain circumstances — harmed innocent civilians. The Court's opinion, written by President Barak, stressed the importance of the state staying within the bounds of the law in its struggle against terrorism.<sup>89</sup> "The war against terrorism is also law's war against those who rise up against it."<sup>90</sup> The decision noted that in combating terrorism, the success of the democratic state is only possible through the adherence to the rule of law.<sup>91</sup> The Supreme Court found that the conflict "between Israel and the terrorist organizations in the *area*" was one of an international character.<sup>92</sup> Because of this, the Court decided that terrorists were permissible targets only as long as they were directly taking part in hostilities.<sup>93</sup> The Court did not make a blanket determination of the permissibility of the strikes, but instead imposed various limitations on the policy of targeted killings, including minimizing the impact on civilians, proportionality requirements, as well as mechanisms of *ex post facto* review.<sup>94</sup> More important than the individual findings of the Supreme Court, however, for present purposes, was the wider impact of this decision. It was not only debated within Israel and in the realm of academics interested in international humanitarian law, but it also occupied considerable space in the report submitted by Philip Alston, the Special Rapporteur on extrajudicial, summary, or arbitrary executions.<sup>95</sup>

The major point of criticism voiced by the Special Rapporteur, without directly taking aim at the Supreme Court of Israel, is how to classify a particular situation and, therefore, which set or sets of rules should apply. By labeling the conflict as one of an

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87. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2006] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf).

88. *Id.*

89. *Id.* at para. 62.

90. *Id.* at para. 62. (quoting HCJ 3451/02 Almandi v. Minister of Def. 56(3) PD 30, 34 [2002] (Isr.)).

91. *Id.* at para. 62.

92. *Id.* at para. 21. For a different view, holding that both human rights law as well as international humanitarian law applies, see David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171 (2005).

93. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr., slip op. paras. 31-40 [2006] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf).

94. *Id.* at paras. 61-64.

95. U.N. Special Rapporteur, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, 6-7, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

international character,<sup>96</sup> the report argues the Court can take advantage of the provisions pertaining to conflicts of an international character, which “arguably [have] more permissive rules for killing than does human rights law or a State’s domestic law and generally provide immunity to State armed forces.”<sup>97</sup> Because of the lower degree of procedural safeguards within international humanitarian law, the “potential for abuse” is higher.<sup>98</sup> This criticism is applicable in the context of legal systems in which the executive power enjoys unfettered discretion and does not have to face judicial intervention. However, this is not the situation in the case of the use of force by the Israeli military.<sup>99</sup> Rejecting the political question doctrine in *Mara’abe*,<sup>100</sup> the Supreme Court decided it would not be deterred from rendering a decision in areas that had previously been considered to fall under the sole purview of the political branches.<sup>101</sup> President Barak’s view that political issues do not fall outside the realm of judicial intervention is central to his larger jurisprudential framework that the role of a judge in a democracy is the “protect[ion of] the constitution and [of] democracy.”<sup>102</sup> This concept becomes concrete when the Court finds that “[t]he petition before us is intended to determine the permissible and the forbidden in combat which might harm the most basic right of a human being — the right to life. The doctrine of institutional non-justiciability cannot prevent the examination of that question.”<sup>103</sup>

President Barak stated — contrary to Cicero<sup>104</sup> — that “when the cannons roar that

96. *Id.* at 6-7, 16. The decision of the Supreme Court of Israel classified the conflict of being of an international character because the military operation took place outside of its border, contradicting the requirements of international humanitarian law (“IHL”) that generally posits that the identity of the parties determine the applicable regime.

97. *Id.* at 16.

98. *Id.*

99. There is a powerful critique that the position of the Supreme Court, including under Barak’s leadership, to not interfere into the domain of the other branches of government underwent only a slow change. For a criticism with respect to the Palestinian territories, see DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 127-35 (2002). Similar criticism has been raised with respect to the question over whether Yeshiva students should be exempt from the military. For the longest time, the court refused to hear the petitions because of the political nature of the dispute. See Amnon Straschnov, *The Judicial System in Israel*, 34 *TULSA L.J.* 527, 534 (1999). It was not until 1998 that the Supreme Court, sitting as the High Court of Justice, found the practice, based on a political compromise since the creation of the state of Israel, to be unconstitutional. The court declared that such a decision should not be taken by administrative regulation, but rather gave the Knesset one year to remedy the situation by enacting a law, mandating it to provide justifications for any exemption to be granted. Again, there is a strong component of comparative law in this judgment. See HC 3267/97 Rubinstein v. Minister of Def. 52(5) PD 481 [1998] (Isr.) available at [http://elyon1.court.gov.il/files\\_eng/97/670/032/A11/97032670.a11.pdf](http://elyon1.court.gov.il/files_eng/97/670/032/A11/97032670.a11.pdf). In 2002, the Knesset passed a law that continued the exemption of Yeshiva students from military service. Joel Greenberg, *Orthodox Torah Students Win Israeli Draft Exemption*, N.Y. TIMES, July 24, 2002, [www.nytimes.com/2002/07/24/world/orthodox-torah-students-win-israeli-draft-exemption.html](http://www.nytimes.com/2002/07/24/world/orthodox-torah-students-win-israeli-draft-exemption.html).

100. HCJ 7957/04 Mara’abe v. Prime Minister of Israel 60(2) PD 477, paras. 14, 31 [2005] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/04/570/079/a14/04079570.a14.htm](http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.htm).

101. *Id.* at para. 31. This was not the first decision in which the Supreme Court had decided questions with political ramifications. See HCJ 390/70 Duikat v. Gov’t of Isr. 34(1) PD 1, 15 [1979] (Isr.). For a comparative as well as an intertemporal perspective on this question, see Benvenisti & Downs, *supra* note 3.

102. Aharon Barak, *The Role of A Supreme Court in A Democracy, and the Fight Against Terrorism*, 58 U. MIAMI L. REV. 125, 126 (2003).

103. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr., slip op. para. 50 [2006] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf).

104. “Silent enim leges inter arma,” meaning “for laws are silent amid arms,” in M.T. CICERONIS, *ORATIO PRO TITO ANNIO MILONE* 4, 43 (John Smyth Purton trans., 1886).

we especially need the laws.”<sup>105</sup> Moreover, the decision made clear that “black holes”<sup>106</sup> do not exist in the law. In all forms of military conflict, a careful balancing must take place between the civilian damage on one hand and the military advantage on the other.<sup>107</sup> This balancing act is explained in greater detail, although in considerable abstraction, leaving the decision to the military commander in a particular situation. The Supreme Court stated that

[A] balance is needed between security needs and individual rights. That balancing casts a heavy load upon those whose job is to provide security. Not every efficient means is also legal. The ends do not justify the means. The army must instruct itself according to the rules of the law. That balancing casts a heavy load upon the judges, who must determine – according to the existing law – what is permitted, and what forbidden.<sup>108</sup>

Crucially, the decision left considerable discretion to the military commander in determining the permissibility of a particular attack. In this way, the decision is structurally similar to those in the separation barrier cases, in which the Supreme Court also left the discretion as to where best to build the barrier to the military — safe for extraordinary circumstances.<sup>109</sup> This particular aspect has led to considerable criticism of the decision.<sup>110</sup> While part of this criticism is not unjustified, it is important to keep in mind the institutional settings and the societal realities in which courts in general — and this court in particular<sup>111</sup> — find themselves in, and the larger implications court rulings can have, i.e., in this case, the insistence on relying on the principle of proportionality, while at the same time recognizing that “special weight” must be given to the “military opinion of the official who is responsible for security.”<sup>112</sup> While the court may

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105. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr., slip op. para. 61 [2006] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf); see also *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, supra note 98, at 19-20.

106. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr., slip op. para. 61 [2006] (Isr.) (citing JOHAN STEYN, *DEMOCRACY THROUGH LAW: SELECTED SPEECHES AND JUDGMENTS* 195 (2004)), available at [http://elyon1.court.gov.il/files\\_eng/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf).

107. *Id.* at para. 60.

108. *Id.* at para. 63. For a previous finding, echoing the same sentiment, see *HCJ 7015/02 Ajuri v. Military Commander of the Judea & Samaria Area* 56(6) PD 352, 358 [2002] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/02/150/070/A15/02070150.a15.pdf](http://elyon1.court.gov.il/files_eng/02/150/070/A15/02070150.a15.pdf).

109. HCJ 2056/04 Beit Sourik Vill. Council v. Gov’t of Isr. 58(5) PD 807, paras. 36, 46 [2004] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/04/560/020/A28/04020560.a28.pdf](http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.pdf).

110. Nir Keidar, *An Examination of the Authority of the Military Commander to Requisition Privately Owned Land for the Construction of the Separation Barrier*, 38 ISR. L. REV. 247, 255-56 (2005); Shany, supra note 67, at 368.

111. This notion was expressed in the *Beit Sourik* case, when the Court found:

We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terrorism. We are aware of the killing and destruction wrought by the terrorism against the State and its citizens. As any other Israelis, we too recognize the need to defend the country and its citizens against terrorism’s severe blow.

HCJ 2056/04 Beit Sourik Vill. Council v. Gov’t of Isr. 58(5) PD 807, para. 63 [2004] (Isr.) (quoting HCJ 2056/04 Beit Sourik Vill. Council v. Gov’t of Isr. 58(5) PD 807, 861 46 [2004] (Isr.)), available at [http://elyon1.court.gov.il/files\\_eng/04/560/020/A28/04020560.a28.pdf](http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.pdf); see also Daphne Barak-Erez, *The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue*, 2 INT’L J. CONST. L. 611, 613 (2004).

112. HCJ 2056/04 Beit Sourik Vill. Council v. Gov’t of Isr. 58(5) PD 807, para. 47 [2004] (Isr.), available at



ultimately leave the individual decision in the hands of the military commander in the case at hand and in the hands of the executive in more general terms, it nevertheless sends an important signal in that it will retain a watchful eye on the actions of the other branches of government. This is arguably where the lasting impact and legacy of the tenure of President Barak may lie, i.e., in the fact that the entire realm of governmental action — be it executive or legislative<sup>113</sup> — is subject to review by the courts.

#### D. *Semi-Open Dialogue*

There are other forms of judicial dialogue outside of reasoned opinions, such as judicial conferences in which judges, policymakers, and scholars exchange their ideas.<sup>114</sup> Some of these groups are convened on an official basis, mostly by international organizations. Two examples include the Judicial Reference Group, as well as the Organization of Supreme Courts of the Americas. The former is a network for fostering dialogue among judges from different jurisdictions under the aegis of the UN High Commissioner for Refugees.<sup>115</sup> The latter was initially convened by the Organization of American States, though its current status is not wholly clear.<sup>116</sup> Other groups are purely private, i.e., associations of individuals who are judges and convene in order to exchange information without official governmental direction to do so. One of the best examples is the International Association of Refugee Law Judges. The *raison d'être* of this private association, membership to which is only open to judges or quasi-judicial decision-makers, has been described by one of its officers as providing the forum for coordination of how best to interpret the obligations contained in the 1951 Refugee Convention.<sup>117</sup> Because it operates outside the bounds of government hierarchies and yet provides a point of information sharing, members consider it highly useful and a viable alternative to official, and often highly formalized modes of information exchange. Other examples include the Commonwealth Magistrates' and Judges' Association,<sup>118</sup> as well as the International Association of Judges.<sup>119</sup> Finally, there are academic institutions which foster not only discourse among judges but also between judges and academia, e.g. the annual meeting of constitutional court justices at Yale Law School.<sup>120</sup>

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[http://elyon1.court.gov.il/files\\_eng/04/560/020/A28/04020560.a28.pdf](http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.pdf).

113. CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Coop. Vill. 49(4) PD 221, para. 1 [1995] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/93/210/068/z01/93068210.z01.pdf](http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf).

114. Krotoszynski Jr., *supra* note 21, at 1329-30.

115. Kirby, *supra* note 3, at 176-79.

116. The original charter is contained in *Charter of the Organization of Supreme Courts of the Americas*, 40 ST. LOUIS U. L.J. 1131 (1996); see also *Support for the Administration of Justice in the Americas*, Dept. of Int'l Legal Affairs, AG/RES. 1407 (XXVI-0/96) (June 7, 1996), available at <http://www.oas.org/juridico/english/ga-res96/Res-1407.htm>; Fernando Carrillo Florez, *Supreme Courts Of The Americas Organization: Judicial Independence And Its Relationship With The Legislative Bodies*, 42 ST. LOUIS U. L.J. 1033, 1043 (1998).

117. Hugo Storey, *The Advanced Refugee Law Workshop Experience: An IARLJ Perspective*, 15 INT'L J. REFUGEE L. 422, 422 (2003).

118. *About the CMJA*, COMMONWEALTH MAGISTRATES' AND JUDGES' ASSOCIATION, <http://www.cmja.org/about.htm> (last visited Feb. 18, 2012).

119. INT'L ASS'N OF JUDGES, <http://www.iaj-uim.org/site/index.php?lang=en> (last visited Feb. 18, 2012).

120. *International Supreme Court and Constitutional Justices Meet at Yale Law School*, YALE L. SCHOOL

Moreover, there is increasing transnational legal communication among courts through official visits or exchanges among courts.<sup>121</sup> For example, the GCC frequently provides press releases when delegations from other courts visit or when GCC judges themselves visit courts abroad. The same is true, for example, for the frequent visits that are reported by the ECtHR.<sup>122</sup>

### E. *Non-Open Dialogue*

Finally, there are forms of transnational legal communication that take place outside of the public limelight. By their very nature, they are harder to track and rely on anecdotal evidence by judges.<sup>123</sup> Several judges themselves have described this type of dialogue as taking place through personal meetings,<sup>124</sup> by email, or through other means of communication.<sup>125</sup> Through the means described above, some judges develop personal relationships with one another, which may indirectly influence each other's way of thinking. As Judge Kirby says, "there will be a meeting of minds between these highly influential intellectual leaders of their nations."<sup>126</sup> Whether this has a direct impact on a particular judgment is hard to determine. It is, however, submitted that the qualifications for judges of the highest order, while not making them immune to undue influences, serve as a bar to merely regurgitating ideas that may have developed elsewhere and communicated in private. Instead, as President Barak has noted, judges are influenced through a variety of sources, and it is imperative that there be a determination of "whether there is anything in the historical development and social conditions that makes the local and the foreign system different enough to render interpretative inspiration impracticable."<sup>127</sup> As pointed out by President Barak, the value in considering comparative law is that it "brings about understanding of the text, not alteration to it" and "provides understanding of national law," rather than wholesale introduction of foreign law into the domestic system.<sup>128</sup> Daphne Barak-Erez echoed this sentiment by saying

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(Oct. 12, 2010), <http://www.law.yale.edu/news/12333.htm>. Most of the sessions that take place in the context of this particular meeting are closed and confidential to create an atmosphere where individual views can be freely exchanged.

121. *Presentation Of The Network*, NETWORK OF THE PRESIDENTS OF THE SUPREME JUD. COURTS OF THE EUROPEAN UNION, <http://www.rpcsjeu.org/page/network> (last visited Feb. 18, 2012).

122. For two examples, see *Meetings and Official Visits 2012*, EUROPEAN CT. OF HUM. RTS., [http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+President/Events/The\\_President\\_Events.htm](http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+President/Events/The_President_Events.htm) (last visited Feb. 18, 2012), as well as *International Relations*, THE CONST. CT. OF THE REPUBLIC OF CROATIA, [http://www.usud.hr/default.aspx?Show=c\\_medjunarodna\\_suradnja&m1=24&m2=0&Lang=en](http://www.usud.hr/default.aspx?Show=c_medjunarodna_suradnja&m1=24&m2=0&Lang=en) (last visited Sept. 20, 2011).

123. Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES, April 12, 2009, at A14.

124. See Michael Kirby, *Dialogue: Think Globally*, 4 GREEN BAG 2d 287, 291-92 (2001).

125. Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 17 (1998).

126. Kirby, *supra* note 124, at 292.

127. Aharon Barak, Chief Justice of Isr., Remarks at The Fulbright Convention: Comparative Law, Originalism and the Role of a Judge in a Democracy: A Reply to Justice Scalia (January 29, 2006) (on file with author).

128. *Id.* at 13-14.

that “learning from other legal systems has always been a major technique in the development of the law.”<sup>129</sup> And unlike others, President Barak’s judicial philosophy would not boil down to an image of a judge as a legal automaton, or in the words of Chief Justice Roberts<sup>130</sup> and Justice Sotomayor,<sup>131</sup> a judge who merely calls “balls and strikes.”

In a rebuke to the concept of originalism, as well as the idea of deciding legal questions in a formalistic manner, President Barak wrote concerning the proper role of judges in a democracy:

The intent of the constitutional authors, however, exists alongside the fundamental views and values of modern society at the time of interpretation. The constitution is intended to solve the problems of the contemporary person, to protect his or her freedom. It must contend with his or her needs. Therefore, in determining the constitution’s purpose through interpretation, one must also take into account the values and principles that prevail at the time of interpretation, seeking synthesis and harmony between past intention and present principle.<sup>132</sup>

#### *F. Academic Teaching and Scholarship*

Another element excluded, for good reason, from the original conception of transnational judicial dialogue was the role that judges play outside of the courtroom. Judges routinely hold positions at academic institutions before, during, and after their time on the bench. Whether through teaching or writing, these positions extend the judge’s impact out of the judicial and into the academic realm. A discussion of President Barak’s legacy is not complete without recognizing his role as a teacher and an academic. President Barak has taught at numerous institutions while sitting on the bench, including, but not limited to, Harvard University, the University of Michigan, the University of Toronto, and Yale University. He has continued in this role to this day, teaching at various institutions outside of Israel in addition to his responsibilities at the Faculty of Law at the Interdisciplinary Center in Herzliya. Through his teaching, President Barak exerted and continues to exert immeasurable influence over an audience comprised of the next generation of lawyers, judges, and legal scholars.

His academic impact extends beyond the classroom to his legal scholarship. Regarded as one of the most astute thinkers on judicial propriety and the protection of

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129. Daphne Barak-Erez, *The Institutional Aspects of Comparative Law*, 15 COLUM. J. EUR. L. 477, 478 (2009).

130. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of Chief Justice John Roberts), available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/55-56.pdf>.

131. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 78, 137 (2009) (statements of Sen. Herb Kohl and Sen. Lindsey Graham), available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh111-503/62-151.pdf>.

132. Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 69 (2002).

individuals from state action, he has authored books and articles on subjects as diverse as human rights, the impact of the American Constitution, and the Uniform Commercial Code.<sup>133</sup> A notable and recurring focus of Barak's writings, however, is the role of the court in protecting democracy.<sup>134</sup> Additionally, two of his most influential books outside of Israel, *Purposive Interpretation*<sup>135</sup> and *The Judge in a Democracy*,<sup>136</sup> have been translated into English and are the sources of academic and popular writing. President Barak is — to date — the only author of the foreword to the Harvard Law Review's annual review of the US Supreme Court's jurisprudence who was at the time a sitting judge of a foreign court.<sup>137</sup>

*G. The Use of Comparative Law as a Communications Device with Foreign and International Counterparts*

Most of these modes of transnational legal communication are part of a narrative that centers around the judicial function *per se*. In many ways, the decisions rendered could be seen just as that — legal decisions with application to a particular case or a particular legal question around which numerous cases arise. The decisions surrounding the barrier/wall/fence may be a case in point. The decisions concerning the separation barrier commanded the attention not only of legal circles but also of the political realm. In the context of the High Court of Justice's first decision, *Beit Sourik*,<sup>138</sup> the Court, and particularly President Barak because of their stature, was regarded as having an ambassadorial function.<sup>139</sup>

An additional type of "communication" that has not been addressed so far, but which has had far-reaching consequences, is the use of comparative law in the jurisprudence of the Supreme Court. This has manifested itself not only with respect to the adoption of solutions that have been found in other legal systems when deciding concrete cases, but also with respect to the use of legal doctrines that may help to further develop a more meaningful version of democratic rule and that may permeate a legal system as such.<sup>140</sup> The most well known of such use of comparative law may be the

133. See Aharon Barak, *Uniform Commercial Code—Commercial Paper—An Outsider's View, Part I*, 3 ISR. L. REV. 7 (1968); Aharon Barak, *The Uniform Commercial Code—Commercial Paper: An Outsider's View, Part II*, 3 ISR. L. REV. 184 (1968); Aharon Barak, *Freedom of Speech in Israel: The Impact of the American Constitution*, 8 TEL AVIV U. STUD. L. 241 (1988); Aharon Barak, *Human Rights in Israel*, 39 ISR. L. REV. 12 (2006).

134. See Barak, *supra* note 132, at 149. Discussing the importance of judicial protection of democracy in general, and of human rights in particular, see Barak, *supra* note 102, at 125-26, 133-34.

135. AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* (Sari Bashi trans., 2005).

136. BARAK, *supra* note 39.

137. Indeed, it appears that while some authors of the foreword were born outside of the US (e.g. Gerald Gunther and Louis Henkin), all of them or certainly the large majority of them held US citizenship.

138. HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Isr. 58(5) PD 807 [2004] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/04/560/020/A28/04020560.a28.pdf](http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.pdf).

139. See Hassan Jabareen, *Ignoring the 'Other'*, 14 ADALAH'S NEWSL. 1, 1-4 (2005) (reviewing AHARON BARAK, *SHOFET BEHEVRA DEMOKRATIT (A JUDGE IN A DEMOCRATIC SOCIETY)* 2005).

140. Barak himself uses a similar conception, calling these two modes of comparison "microcomparison" and "macrocomparison," respectively, and remains cognizant of the need to compare legal systems that share at least a core of social and historical circumstances. See BARAK, *supra* note 39, at 197-200.

adoption of judicial review, as outlined below. Another example of the use of comparative law that had more far-reaching consequences is the adoption of the principle of proportionality on a much wider scale than before.<sup>141</sup>

Much more than other countries, Israel was characterized by not having a written constitutional design. At the time of the founding of Israel, there had been plans to create a written constitution by the beginning of October 1948,<sup>142</sup> but that written constitution as such never materialized. Constitutional principles thus had to be created without a written document to base it on. As President Barak put it, Israel has had to develop “constitutional law . . . without a . . . constitution.”<sup>143</sup> Since 1958, the Knesset passed Basic Laws on the structure of the state and its institutions,<sup>144</sup> but until 1992, the country lacked a constitution-type document relating to personal freedoms. At that time, it adopted a Basic Law that guaranteed human dignity and freedom, albeit with few details and very general language.<sup>145</sup> Importantly, however, both documents contained limitation clauses, i.e. one of the cornerstones of modern constitutionalism.

It was not until 1995 in the Court’s famous *Bank Mizrahi* decision that judicial review was firmly established in Israel.<sup>146</sup> In that opinion, which oftentimes has been compared to *Marbury v. Madison*<sup>147</sup> and is considered by many as one of the most important comparative constitutional law decisions,<sup>148</sup> the Court held that because of the

141. For an extensive treatment of the subject, see *id.* at 254; see also AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Doron Kalir trans., 2012). The principle was first expounded upon in its current form in *CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Coop. Vill.* 49(4) PD 221 *passim* [1995] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/93/210/068/z01/93068210.z01.pdf](http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf). For a comparative perspective, see Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 72 (2008).

142. Declaration of the Establishment of the State of Israel, 5708-1948, 1 LSI 3, 4 (1948) (Isr.).

143. Aharon Barak, *Constitutional Law Without a Constitution: The Role of the Judiciary*, in THE ROLE OF COURTS IN SOCIETY 448 (Shimon Shetreet ed., 1988); Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309 (1995); Menachem Hofnung, *The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel*, 44 AM. J. COMP. L. 585, 588-92 (1996). But see the comments by Posner, remarking that “Israel is an immature democracy, poorly governed; its political class is mediocre and corrupt; it floats precariously in a lethally hostile Muslim sea; and it really could use a constitution” in Richard Posner, *Enlightened Despot*, THE NEW REPUBLIC (Apr. 23, 2007, 12:00 AM), <http://www.tnr.com/article/enlightened-despot>. For a reply, see Barak Medina, *Four Myths of Judicial Review: A Response to Richard Posner’s Critique of Aharon Barak’s Judicial Activism*, 49 HARV. INT’L L.J. ONLINE 1 (Aug. 16, 2007).

144. Basic Law: The Knesset, 5718-1958, S.H. No. 244 p. 69 (Isr.); Basic Law: Israel Lands, 5720-1960, S.H. No. 312 p. 56 (Isr.); Basic Law: The President of the State, 5724-1964, S.H. No. 428 p. 118 (Isr.); Basic Law: The Government, 5761-2001, S.H. No. 1780 p. 158 (Isr.); Basic Law: The State Economy, 5735-1975, S.H. No. 777 p. 206 (Isr.); Basic Law: The Military, 5736-1976, S.H. No. 806 p. 154 (Isr.); Basic Law: Jerusalem, Capital of Israel, 5740-1980, S.H. No. 980 p. 186 (Isr.); Basic Law: The Judiciary, 5744-1984, S.H. No. II 10 p. 78 (Isr.); Basic Law: The State Comptroller, S.H. 5748 p. 30 (Isr.). The Basic Law concerning “The Government” was replaced twice.

145. Basic Law: Human Dignity and Liberty, 5752-1992, S.H. No. 1391 (Isr.); Basic Law: Freedom of Occupation, 5754-1994, S.H. No. 1454 p. 90 (Isr.).

146. *CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Coop. Vill.* 49(4) PD 221 *passim* [1995] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/93/210/068/z01/93068210.z01.pdf](http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf). For a different view, holding that judicial review was already established in the 1960s, see Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Legislative Override Power*, 39 HASTINGS CONST. L.Q. 457 (2012); Patricia J. Woods, *The Ideational Foundations of Israel’s “Constitutional Revolution,”* 62 POL. RES. Q. 811, 811 (2009).

147. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

148. See, e.g., Yoram Rabin & Arnon Gutfeld, *Marbury v. Madison and Its Impact on Israeli Constitutional Law*, 15 U. MIAMI INT’L & COMP. L. REV. 303, 318-22 (2007); Zeev Segal, *The Israeli Constitutional Revolution: The Canadian Impact in the Midst of a Formative Period*, 8 CONST. F. 53, 55 (1997); Ran Hirschl,

Knesset's function as a constitutional assembly when passing the Basic Law pertaining to human dignity and freedom, all other laws would from then on be measured against this standard.<sup>149</sup> In the interpretation of what it meant to be a Jewish and a democratic state, guidance could be gleaned from the Declaration of Independence, as well as what Justice Barak (at the time) called a background-understanding model.<sup>150</sup> The *Bank Mizrahi* decision was important for a number of reasons.<sup>151</sup> Acting without a formal constitution (in important ways similar to the constitutional design of the UK), Israel's system had previously been characterized by parliamentary sovereignty and not — as the decision logically requires — by the supremacy of some kind of constitutional arrangement. This meant that a Basic Law could only be changed by another Basic Law.<sup>152</sup> Complicating things, the Knesset passes Basic Laws without any requirement that supersedes those for other legislative acts. Rather than imposing a supermajority, Basic Laws can be passed and have been passed with simple majorities. While Basic Laws thus have no special procedural requirements and one could thus argue they should not enjoy special status,<sup>153</sup> the term “constitutional revolution” has been used by many to describe the development that followed the passage of the two Basic Laws pertaining to the protection of the rights of individuals.<sup>154</sup> Importantly, these two Basic Laws contained language that prohibited infringement upon the basic rights contained in them, unless four cumulative conditions were met. The limitations would have to (1) be prescribed by law, (2) be compatible with Israel's basic values as a Jewish and a democratic State, (3) promote a worthy purpose, and (4) prevent the introduction of excessive restrictions.<sup>155</sup>

The importance of the decision was summed up by President Barak himself when he summarized the elements that transformed the constitutional system of Israel:

[W]e became a constitutional democracy. We joined the democratic, enlightened nations in which human rights are awarded a constitutional

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Note, *Israel's 'Constitutional Revolution': The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order*, 46 AM. J. COMP. L. 427, 447 (1998). The decision contributed greatly to and put the Israeli Supreme Court at the center of the debate about the propriety of judicial review. See ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 111-34 (2003). See generally RONALD DWORKIN, *Rights as Trumps*, in THEORIES OF RIGHTS, 153-67 (Jeremy Waldron ed., 1984); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

149. CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Coop. Vill. 49(4) PD 221 [1995] (Isr.) (opinion of President A. Barak), available at [http://elyon1.court.gov.il/files\\_eng/93/210/068/z01/93068210.z01.pdf](http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf).

150. Barak, *supra* note 143, at 451-52.

151. CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Coop. Vill. 49(4) PD 221 [1995] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/93/210/068/z01/93068210.z01.pdf](http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf).

152. See, e.g., Basic Law: Human Dignity and Liberty, 5752-1992, S.H. No. 1391 para. 12 (Isr.); Basic Law: Freedom of Occupation, 5754-1994, S.H. No. 1454 p. 90 para. 5 (Isr.); CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Coop. Vill. 49(4) PD 221, para. 8 [1995] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/93/210/068/z01/93068210.z01.pdf](http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf).

153. See for this and a general critique, Ruth Gavison, *A Constitutional Revolution?*, in TOWARDS A NEW EUROPEAN IUS COMMUNE: ESSAYS ON EUROPEAN, ITALIAN AND ISRAELI LAW, IN OCCASION OF 50 YEARS OF THE E.U. AND OF THE STATE OF ISRAEL 517, 517-26 (A. Gambaro & A.M. Rabello eds., 1999).

154. The term is used by Aharon Barak himself, but also by others. See CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Coop. Vill. 49(4) PD 221, paras. 1-4 [1995] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/93/210/068/z01/93068210.z01.pdf](http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf); see also Yoram Rabin & Yuval Shany, *The Israeli Unfinished Constitutional Revolution: Has the Time Come for Protecting Economic and Social Rights?*, 37 ISR. L. REV. 299, 300 (2003-04).

155. See Basic Law: Human Dignity and Liberty, 5752-1992, S.H. No. 1391 para. 8 (Isr.).

force, above the regular statutes. Similar to the United States, Canada, France, Germany, Italy, Japan and other western countries, we now have a constitutional defense for Human Rights. We too have the central chapter in any written constitution, the subject-matter of which is Human Rights; we too have restrictions on the legislative power of the legislator; we too have judicial review of statutes which unlawfully infringe upon constitutionally protected human rights; we too have a written constitution, to which the Knesset in its capacity as legislator is subject and which cannot alter.<sup>156</sup>

Owen Fiss described this endeavor by drawing on a variety of sources, including statutes and customary international law. More importantly however, President Barak derived the necessity for a judicial mechanism from “theoretical reflections on the requirements of democracy.”<sup>157</sup> Under President Barak’s understanding, democracy rests on two pillars. The first is popular sovereignty, i.e. elections in which the people choose their representatives who, in turn, represent their views. This formal pillar, a hallmark of which is majority rule, does not, however, sufficiently address the rights of the minority<sup>158</sup> as well as other issues that are crucial for democracy.<sup>159</sup> The centrality of this second aspect of democracy for the jurisprudential position of President Barak becomes clear when he posits that without substantive aspects of democracy — namely separation of powers, rule of law, judicial independence, human rights, and basic principles that reflect other values, social objectives and appropriate ways of behavior — a system of governance cannot be called a democracy.<sup>160</sup> Indeed, this dual view of democracy was specifically espoused in the court’s *Bank Mizrahi* opinion.<sup>161</sup>

The *Bank Mizrahi* decision, the importance of which was largely unnoticed at first because of the assassination of Yitzhak Rabin on the preceding day, came under heavy criticism for empowering the Supreme Court in ways that the Basic Laws had not envisioned.<sup>162</sup> And while it is true that modern constitutions generally provide for judicial review,<sup>163</sup> and even more established constitutional systems adopt judicial review,<sup>164</sup> the argument for judicial review is more difficult to maintain in the absence of express constitutional provisions to that effect. Given President Barak’s proclivity for using comparative law, it is unsurprising that the judgment reflects on modern

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156. Aharon Barak, *The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and Its Effect on Procedural and Substantive Criminal Law*, 31 ISR. L. REV. 3, 3 (1997).

157. Owen Fiss, *Law Is Everywhere*, 117 YALE L.J. 256, 271 (2007).

158. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 78-79, 135-36 (1980); Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 CALIF. L. REV. 429, 437 (1998).

159. Post, *supra* note 158, at 438.

160. BARAK, *supra* note 39, at 23-24, 33-38.

161. CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Coop. Vill. 49(4) PD 221, para. 80 [1995] (Isr.) (opinion of President Shamgar), available at [http://elyon1.court.gov.il/files\\_eng/93/210/068/z01/93068210.z01.pdf](http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf). For academic precursors, see RONALD DWORKIN, *A BILL OF RIGHTS FOR BRITAIN* 35 (1990).

162. Gavison, *supra* note 153, at 522-23.

163. TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 33 (2003); Ackerman, *supra* note 9, at 781; David Deener, *Judicial Review in Modern Constitutional Systems*, 46 AM. POL. SCI. REV. 1079, 1090, 1098 (1952).

164. See generally Ariel L. Bendor & Zeev Segal, *Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, A New Judicial Review Model*, 17 AM. U. INT’L L. REV. 683 (2002).

constitutional structures and finds that the “twentieth century is the century of judicial review.”<sup>165</sup> Even more important appears to be the dual nature of democracy described above. The judgment even contends that:

[W]hoever argues that judicial review is undemocratic is in effect arguing that the constitution itself is undemocratic. To maintain that judicial review is undemocratic is to maintain that safeguarding human rights is undemocratic. To maintain that judicial review is undemocratic is to maintain that defending the rights of the individual against the majority is undemocratic.<sup>166</sup>

At the very least, President Barak’s view is internally consistent. He, like others,<sup>167</sup> defends judicial review as a prerequisite for the existence of a substantive democracy, holistically understood, as opposed to merely a formal democracy. Holding otherwise could tip the balance of power between the separate branches of government and may leave the rights of the minority without adequate protection. It is, at least implicitly, also a rejection of the Waldronian conception “that right-bearers have the right to resolve disagreements about what rights they have among themselves and on roughly equal terms” as the “only plausible rights-based theory of authority.”<sup>168</sup> These efforts have indeed changed Israel’s constitutional system in a fundamental way.

The Achilles’ heel of this design of course is that the Knesset could, by enacting another Basic Law, roll back the achievements that have been made since *Mizrahi*.<sup>169</sup> The justices were cognizant of this potential challenge and fused the new review power with deep constitutional principles to hedge against the intrusion by the legislature.<sup>170</sup> This type of analysis is reminiscent of the jurisprudence of other supreme and constitutional courts, and variably uses terms such as “unconstitutional constitutional provision” (*verfassungswidrige Verfassungsnormen*) in the case of Germany<sup>171</sup> or “common law constitutionalism” in the case of Canada.<sup>172</sup> Through the societal entrenchment of these values over time it has progressively become more difficult for a legislature to do exactly what it could, in theory, set out to do. It is here where both

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165. CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Coop. Vill. 49(4) PD 221, para. 80 [1995] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/93/210/068/z01/93068210.z01.pdf](http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf).

166. *Id.*

167. For a similar view, see generally ELY, *supra* note 161; Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991 (2006). *But see* David Enoch, *Taking Disagreement Seriously: On Jeremy Waldron’s Law and Disagreement*, 39 ISR. L. REV. 22 (2006).

168. JEREMY WALDRON, *LAW AND DISAGREEMENT* 254 (1999).

169. There have been repeated attempts to curb the power of the Supreme Court from a number of political actors. *See* Doron Navot & Yoav Peled, *Towards a Constitutional Counter-Revolution in Israel?*, 16 CONSTELLATIONS 429 *passim* (2009).

170. Weill, *supra* note 146, at 25.

171. The concept of unconstitutional constitutional amendments is explicitly dealt with in the German Constitution in Article 79(3), which states: “Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.” GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [Basic Law], May 23, 1949, BGBl. I at art. 79(3) (Ger.); *see also* decision of the German Constitutional Court in BVerfGE 1, 14 of Oct. 23, 1951 (Ger.), with an early critique of the concept by OTTO BACHOF, *VERFASSUNGSWIDRIGE VERFASSUNGSNORMEN?* (1951).

172. Thomas Poole, *Questioning Common Law Constitutionalism*, 25 LEGAL STUD. 142 *passim* (2005); Mark D. Walters, *The Common Law Constitution in Canada: Return of Lex Non Scripta as Fundamental Law*, 51 U. TORONTO L.J. 91 *passim* (2001).



legitimate criticisms may be raised, but also where, in the case of Israel, careful constitutional jurisprudence has advanced the cause of the charged type of democracy described by President Barak.<sup>173</sup>

The need for a strong protection of the rights of (disenfranchised) individuals from the perspective of the Court can also be seen in its jurisprudence regarding human dignity. Since the Basic Law: Human Dignity and Liberty contains only a limited number of human rights guarantees, the Supreme Court developed a broad conception of human dignity.<sup>174</sup> Under this conception, dignity “is the source from which all other human rights are derived,” and it “unites the other rights into a whole.”<sup>175</sup> In this context, comparative law has played a critical role. The interpretation of dignity has been influenced considerably by the jurisprudence of its German sister court,<sup>176</sup> but has, in its detail, far surpassed — in terms of breadth and depth<sup>177</sup> — the jurisprudence of the GCC. Dignity, according to President Barak, encompasses equality, personal self-determination (or freedom of will), physical or mental welfare, and finally, the right not be objectified, with the latter encompassing a number of due process rights.<sup>178</sup>

In the framework developed above, this manner of influence qualifies President Barak as a recipient of foreign sources, sometimes silently, sometimes openly acknowledging the origin of his thinking. However, the scope and scale of the issue posed is a distinguishing factor between the typical examples of this mode of transnational legal communication. Oftentimes, such transnational legal communication is concerned with narrow questions focused on a particular subject matter and not with the construction of an entire set of constitutional principles.<sup>179</sup>

Comparative law played a crucial role in the elucidation of all of these areas, regardless of whether this concerned the fundamental requirements of democracy, the development of the Court’s human rights jurisprudence, or the conception of principles such as proportionality.<sup>180</sup> It is less clear what impact the Court’s own jurisprudence — and particularly the one during President Barak’s tenure — has had on its sister institutions in other countries. There is little overt evidence that this has been the case. Unlike other studies that have tried to trace the influence of foreign courts’ decisions on sister institutions,<sup>181</sup> no such study exists for the Supreme Court of Israel. Additionally, there are only a small number of decisions in the United States that specifically mention

173. Nevertheless, there has been opposition to finalizing what has been called the piecemeal approach to this constitutional project. See Rabin and Shany, *supra* note 154, at 313-27. On the notion of Israel having a piecemeal constitution, see Hirschl, *supra* note 148, at 429.

174. BARAK, *supra* note 39, at 85-87.

175. *Id.* at 85.

176. Izhak England, *Human Dignity: From Antiquity to Modern Israel’s Constitutional Framework*, 21 CARDOZO L. REV. 1903, 1923-24 (2000).

177. For a critical voice on the bench on the breadth of the concept of dignity, see the opinion of Justice Dorner, HCJ 4541/94 *Miller v. Minister of Def.* 49(4) PD 94 [1995] (Isr.). For a critical review, see David Kretzmer, *Human Dignity in Israeli Jurisprudence*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 161, 161-62 (David Kretzmer & Eckart Klein eds., 2002).

178. BARAK, *supra* note 39, at 86-87.

179. Jabareen, *supra* note 139, at 2, 4.

180. BARAK, *supra* note 39, at 197-200.

181. See generally Gelter & Siems, *Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations between Ten European Supreme Courts*, *supra* note 24; Gelter & Siems, *Language, Legal Origins, and Culture before the Courts: Cross-Citations between Supreme Courts in Europe*, *supra* note 24.

decisions by the Supreme Court of Israel for their jurisprudential view<sup>182</sup> and outside of cases which deal with a subject matter directly related to Israel.<sup>183</sup>

The situation is not markedly different for other foreign courts. This stands in somewhat sharp contrast to the attention that is being paid to Israel politically. Indeed, even in jurisdictions that are known to be outward-looking, the number of references to the jurisprudence (as opposed to a specific case) is very small.<sup>184</sup> Importantly however, the jurisprudence of the Supreme Court has been taken up in the context of reviewing anti-terrorist measures in both Canada<sup>185</sup> and the U.K.<sup>186</sup> The U.K. Court of Appeal quoted at length the Supreme Court's decision in *Public Committee against Torture in Israel v. The Government of Israel* and considered the decision to reflect

a basic truth which applies in any jurisdiction where public power is subject to the rigour of democracy and the rule of law. It is that State power is not only constrained by objective law - that is, the imperative that it be exercised fairly, reasonably and in good faith and within the limits of any relevant statute. More than this: the imperative is one which cannot be set aside on utilitarian grounds, as a means to a further end. It is not in any way to be compromised.<sup>187</sup>

There are a number of reasons that may explain the lack of citation to the Supreme Court of Israel's jurisprudence, however. While the most important judgments are being translated, the language barrier goes some way towards explaining the lack of reference by foreign courts.<sup>188</sup> A number of countries simply do not cite foreign jurisprudence, either for fear of being accused of adopting foreign judgments without proper authorization to do so<sup>189</sup> or because judges have not done so historically,<sup>190</sup> i.e. citing foreign judgments has never been part of the judicial culture.<sup>191</sup> There may also be

182. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 88 (E.D.N.Y. 2005), *aff'd*, 517 F.3d 104 (2d Cir. 2008).

183. *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993) (involving extradition to Israel of alleged Nazi war criminal); *In re Inflight Explosion on Trans World Airlines, Inc.* 778 F. Supp. 625, 640 (E.D.N.Y. 1991) (involving Israeli decision suggesting that common law nations endorse psychic damages resulting from physical injuries), *rev'd*, 975 F.2d 35 (2d Cir. 1992).

184. For example, see the Canadian Supreme Court making reference to the Supreme Court of Israel in *Braker v. Marcovitz*, [2007] 3 S.C.R. 607, paras. 149-53 (Can.), and the Federal Court of Australia in *Szygy v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 220 ALR. 394, para. 122 (Austl.).

185. Orna Ben-Naftali & Keren Michaeli, *Public Committee Against Torture in Israel v. Government of Israel*, *Case No. HCJ 769/02*, 101 A.M. J. INT'L. L. 459, 460 (2007). See generally Application under s. 83.28 of the Criminal Code (Re), [2004] 2 S.C.R. 248 (Can.).

186. *A & Ors. v. Sec'y of State for the Home Dep't*, [2004] EWCA (Civ) 1123, [2005] 1 W.L.R. 414 (U.K.).

187. *Id.* at paras. 250-51 (citing HCJ 5100/94 Pub. Comm. Against Torture in *Isr. v. Israel* 53(4) PD 817, para. 39 [1999] (Isr.)). The cited decision, one of the most famous decisions of the Supreme Court of Israel and itself making use of other courts' jurisprudence, posits that "[a] democracy must sometimes fight with one hand tied behind its back." HCJ 5100/94 Pub. Comm. Against Torture in *Isr. v. Israel* 53(4) PD 817, para. 39 [1999] (Isr.).

188. See reference made by the European Court of Human Rights' Grand Chamber judgment in *Evans v. United Kingdom*, App. No. 6339/05, Eur. Ct. H.R. para. 49 (Apr. 10, 2007).

189. See *Lawrence v. Texas*, 539 U.S. 558, 598 (2003), although it appears that this type of criticism does not appear to the same extent as it does in the US.

190. GUIDO ALPA, *TRADITION AND EUROPEANIZATION IN ITALIAN LAW* (2005).

191. Basil Markesinis, *Judicial Mentality: Mental Disposition or Outlook as a Factor Impeding Recourse to Foreign Law*, 80 TUL. L. REV. 1325 *passim* (2006); see also HIGHEST COURTS AND THE INTERNATIONALISATION OF LAW: CHALLENGES AND CHANGES (Sam Mueller & Marc Loth eds., 2009).

personal preferences that lead a judge to not disclose the source for their jurisprudential reasoning. In such instances, which are not necessarily limited to foreign law or international law influences, it may be impossible to know whether a foreign court's jurisprudence ultimately played a role in how a court reached its conclusion.

#### IV. CONCLUSION

What this article has attempted to do is to build upon and expand the framework of transjudicial communication. It applied this expanded framework — coined transnational legal communication — to the legacy of former President of the Supreme Court of Israel, Aharon Barak. There are lacunae in this description, and this kind of typology does not do justice to the often self-reinforcing elements. As is true so often, especially here, the sum is far greater than its parts.

President Barak most forcefully rebutted the arguments against the use of comparative law when he stated that originalism “does not take democracy seriously enough.”<sup>192</sup> One of President Barak's most vocal critics — Justice Scalia — commented that President Barak had a greater impact on his own legal system than any other justice before him, and beyond that he probably had the greatest impact on other systems around the world of justices alive today.<sup>193</sup> Naturally, his detractors, of which there are many from a great variety of ideological camps, claim that President Barak's regrettable international influence only served to further anti-democratic tendencies through “judicial authoritarianism.”<sup>194</sup> Richard Posner criticizes him for pushing a political ideology in the name of democracy without being democratically accountable, dismissing any comparisons one may draw in his jurisprudence on the basis of Israel having a corrupt and underdeveloped political and legal system.<sup>195</sup> Others have found his legacy “disappointing” because of the perceived lack of protection of human rights, e.g. in the occupied territories.<sup>196</sup>

What this careful balancing act between advancing the protection of human rights on one hand and navigating the convoluted interplay between the political institutions, especially in a country like Israel, on the other requires is a judge who is sensitive to the role accorded to her or him in a society. In *The Judge in a Democracy*, President Barak posits that “law is everywhere.”<sup>197</sup> This outlook differs considerably from that of other courts. Most notably is the contrast to the U.S. system with its largely deferential attitude towards executive decision-making.<sup>198</sup> If, however, that statement is accepted and if, on

192. Barak, *supra* note 127. This is further elaborated on in BARAK, *supra* note 39, at 133-35.

193. Antonin Scalia, quoted in Benjamin Soskis, *Judging Aharon*, THE JEWISH DAILY FORWARD (July 10, 2007), <http://www.forward.com/articles/11114/>.

194. Robert H. Bork, *Barak's Rule*, WINTER 5767 AZURE 125, 127, 131 (2007) (reviewing AHARON BARAK, *THE JUDGE IN A DEMOCRACY* (2006)).

195. Posner, *supra* note 143.

196. Nimer Sultany, *The Legacy of Justice Aharon Barak: A Critical Review*, 48 HARV. INT'L L.J. ONLINE 83, 83 (Apr. 30, 2007).

197. BARAK, *supra* note 39, at 309.

198. For a fundamentally different conception in U.S. administrative law, see *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Similarly, Antonin Scalia, *Judicial Deference to*

that basis, legal constraints bind the executive even in times of war (using this terminology with all necessary precautions), it is imperative that legal principles are not readily shelved for political expediency. In the case of President Barak, this was most apparent in the decisions concerning national security. Despite the constant state of threat that Israel is under, the decisions he authored did not give the executive free reign but rather maintained that human dignity<sup>199</sup> and limited powers<sup>200</sup> prevail.<sup>201</sup> While it can be argued that the nature of threats in Israel and the United States have historically differed considerably, the exceptional nature of war time in Israel has never justified the high degree of deference afforded the executive in the United States.<sup>202</sup>

Judge Calabresi said that “[w]ise parents do not hesitate to learn from their children.”<sup>203</sup> It seems fitting to remember this quote from his concurrence in *U.S. v. Then*. Not only did President Barak influence—as even his critics note—other courts and judges around the world, but he himself was also influenced by those same courts and judges. He taught others, but also learned from them. President Barak has been influenced by his careful consideration of foreign sources and comparative law. He has been both a creator and an internalizer of foreign and international norms. His greatest legacy however goes well beyond the immediate decisions that he rendered while on the court. More importantly than those decisions is the change in legal thinking his jurisprudence has brought about during his tenure and beyond.

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*Administrative Interpretations of Law*, 1989 DUKE L.J. 511 *passim* (1989). For a critical perspective, see Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1 *passim* (2000). For a comparative perspective between Israel and the United States, see Amos N. Guiora & Erin M. Page, *Going Toe to Toe: President Barak's and Chief Justice Rehnquist's Theories of Judicial Activism*, 29 HASTINGS INT'L & COMP. L. REV. 51 (2005); see also WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WAR TIME* 225 (1st ed. 1998) (Rehnquist pointing out that laws “will speak with a somewhat different voice” during war time).

199. HCJ 5100/94 Pub. Comm. Against Torture in Isr. v. Israel 53(4) PD 817, paras. 24-25, 27 [1999] (Isr.).

200. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2006] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf). For another important decision on detention requirements, see generally HCJ 7957/04 *Mara'abe v. Prime Minister of Israel* 60(2) PD 477 [2005] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/04/570/079/a14/04079570.a14.htm](http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.htm). For a decision concerning questions of a humanitarian nature, see generally HCJ 4764/04 *Physicians for Human Rights v. IDF Commander in Gaza* 58(5) PD 385 *passim* [2004] (Isr.).

201. For a more theoretical discussion, see generally Barak, *supra* note 132.

202. This of course presupposes, as Janice Rogers Brown suggests, a positive view of judges as “unproblematic protectors of individual liberties,” whereas it can well be argued that “judges themselves are part of the government, [they] help command the coercive apparatus of the state, and can themselves be a source of illiberal power,” and in essence be “highly problematic protectors of individual liberty.” Hon. Janice Rogers Brown, U.S. Court of Appeals for the D.C. Circuit, Lecture given at the Univ. of Haifa: Liberty and Limited Government: The Role of a Judge in a Democratic Society 4-5 (Dec. 27, 2006), available at [http://www.fulbright.org.il/fileadmin/fulbright/editor/Files/JBrown\\_Barak\\_symp\\_speech.doc](http://www.fulbright.org.il/fileadmin/fulbright/editor/Files/JBrown_Barak_symp_speech.doc).

203. *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995). For a similar point, see Ruth Bader Ginsburg, “A Decent Respect to the Opinions of [Human]Kind”: *The Value of a Comparative Perspective in Constitutional Adjudication*, 26 ST. LOUIS U. PUB. L. REV. 187, 187 (2007).

